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REGULATORY AUTH.



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'99 APR 15 PM 1 58  
April 15, 1999

Guy M. Hicks  
General Counsel

OFFICE OF THE  
EXECUTIVE SECRETARY

VIA HAND DELIVERY

David Waddell, Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: *Complaint of AVR of Tennessee, LP dba Hyperion of Tennessee, L.P. Against  
BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and  
"Most Favored Nation" Provision of the Parties' Interconnection Agreement  
Docket No. 98-00530*

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Rebuttal Testimony of Albert Halprin and Jerry Hendrix on behalf of BellSouth Telecommunications, Inc. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

A handwritten signature in cursive script that reads "Guy Hicks by firt w permission".

Guy M. Hicks

GMH:ch  
Enclosure



1       ever intended for such communications to be included in that agreement.  
2       There can be no basis for Mr. Martin's argument that ISP-bound traffic is  
3       "local" for purposes of the agreement, because such traffic clearly does not  
4       both originate and terminate in the same exchange or in an associated  
5       "Extended Area Service" (EAS) exchange. That view of Internet  
6       communications was expressly affirmed by the FCC in its recent *ISP*  
7       *Declaratory Ruling*.<sup>1</sup> By the terms of section 251 of the Communications Act  
8       and by the terms of the interconnection agreement, ISP-bound traffic clearly  
9       does not meet the criteria for reciprocal compensation.

10

11   **Q.     MR. MARTIN NOTES THE FCC'S ISP DECLARATORY RULING ON**  
12       **PAGES 12-13 OF HIS TESTIMONY. IS HIS ASSESSMENT OF THE**  
13       **IMPACT OF THE RULING CORRECT?**

14

15   A.     No, it is not. Mr. Martin either misunderstands or ignores the true import of  
16       the jurisdictional decision in the FCC's *ISP Declaratory Ruling*. If ISP calls  
17       originated and terminated in the same exchange, there is no way--as a matter of  
18       law or fact--that they could be held to be interstate for jurisdictional purposes.  
19       By affirming its consistent, longstanding view of ISP calls as jurisdictionally  
20       interstate, the FCC has obliterated any possible argument that such calls could

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22   1 See *Implementation of the Local Competition Provisions in the Telecommunications*  
23   *Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory  
24   Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket  
   No. 99-68 (rel. Feb. 26, 1999) ("*ISP Declaratory Ruling*").

25

1 be considered local calls. The Commission has established beyond rebuttal  
2 that ISP-bound calls cannot be said to originate and terminate within the same  
3 local exchange.

4

5 **Q. ARE THERE ANY POSSIBLE GROUNDS UPON WHICH A STATE**  
6 **COULD BASE A RULING THAT ISP CALLS SHOULD BE**  
7 **INCLUDED AMONG THOSE SUBJECT TO RECIPROCAL**  
8 **COMPENSATION PROVISIONS?**

9

10 **A.** States can require reciprocal compensation payments if they find that the  
11 parties to an interconnection agreement voluntarily chose to include ISP calls  
12 among those subject to the reciprocal compensation provisions of their  
13 agreement. As I will discuss further below, that clearly was not the case with  
14 regard to the BellSouth-Hyperion agreement. Beyond that, the FCC left open  
15 the possibility that states could act through their Section 252 arbitration duties  
16 to require that ISP calls be made subject to reciprocal compensation, if they  
17 had an independent legal basis to do so, and as long as they acted in a manner  
18 consistent with governing federal law. But the FCC offered no suggestions as  
19 to any such legal basis for action that could be consistent with federal law,  
20 because there is none. There is nothing in the Communications Act, as  
21 amended, that suggests that states can require the payment of reciprocal  
22 compensation for interstate, interexchange calls.

23

24 **Q. HAS MR. MARTIN EXPLAINED HIS ASSERTION, EXPRESSED ON**  
25 **PAGES 10-12 OF HIS TESTIMONY, THAT ISP CALLS SHOULD BE**

1           **CONSIDERED "LOCAL" CALLS UNDER THE TERMS OF THE**  
2           **INTERCONNECTION AGREEMENT?**

3  
4    A.     No, and he cannot. As explained in my direct testimony, ISP Internet  
5           communications that originate on one local exchange carrier's (LEC's) network  
6           and traverse another LEC's network do not "terminate" at the ISP's local server.  
7           In fact, those calls constitute real-time communications linking the originating  
8           end user directly to Internet websites and beyond. In its *ISP Declaratory*  
9           *Ruling*, the FCC concluded that "the communications at issue here do not  
10          terminate at the ISP's local server. . .but continue to the ultimate destination or  
11          destinations, specifically at an Internet website that is often located in another  
12          state."<sup>2</sup>

13  
14          Mr. Martin cites practices such as provisioning ISP calls through "local" tariffs  
15          and providing Internet access through seven-digit or ten-digit "local" codes.  
16          But those assertions seem to be little more than an attempt to throw up a cloud  
17          of flak that obscures the true nature of ISP traffic. The issue is actually quite  
18          straightforward: There is no way to define ISP-bound calling as "local"  
19          because an Internet communication cannot accurately be said to "terminate" in  
20          any single location--much less within the same exchange where it originated.  
21          The FCC made clear in its *ISP Declaratory Ruling* that it analyzes such calls  
22          on an end-to-end basis. "Thus we analyze ISP traffic for jurisdictional

23  
24        

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25        <sup>2</sup> *Id.* at para. 12.

1 purposes as a continuous transmission from the end user to a distant Internet  
2 site."<sup>3</sup>

3

4 **Q. ON PAGE 10, MR. MARTIN CITES THE DEFINITION OF LOCAL**  
5 **TRAFFIC IN SECTION I.SS OF THE INTERCONNECTION**  
6 **AGREEMENT. DOES THAT DEFINITION PROVIDE A CLEAR**  
7 **INDICATION THAT ISP CALLS SHOULD NOT BE SUBJECT TO**  
8 **RECIRPOCAL COMPENSATION PROVISIONS?**

9

10 A. It does. According to section I.SS, local traffic is "any telephone call that  
11 originates and terminates in either the same exchange, or an associated  
12 Extended Area ("EAS") exchange."<sup>4</sup> So it is clear by the wording of the  
13 agreement itself that ISP calls are anything but "local." That is, they do not  
14 originate and terminate in the same exchange or EAS exchange. And since  
15 they are not local calls as defined in the interconnection agreement, they cannot  
16 be subject to reciprocal compensation obligations.

17

18 All determinations concerning jurisdiction flow from that reality and  
19 necessarily reflect it. We need only look at why end users initiate such  
20 communications to see that the ISP is simply a way station for communications

21

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22 <sup>3</sup> *Id.* at para. 13.

23 <sup>4</sup> See Agreement Between BellSouth Telecommunications, Inc., and Hyperion of  
24 Tennessee, L.P. (effective April 1, 1997) ("*BellSouth-Hyperion Agreement*").

25

1 between the end user and the entire universe of the Internet. It stretches  
2 common sense to posit the argument that an end user, in initiating an Internet  
3 session, is seeking to communicate with the ISP itself. The call does not  
4 terminate with the ISP, nor would the end user want it to. Rather, the end user  
5 is seeking to establish a real-time communication link with various websites on  
6 the Internet and with other end users beyond that. The ISP serves merely as a  
7 relay point for access to those websites, which might be anywhere in the world.  
8 Certainly, the websites are not likely to be limited to the same exchange area  
9 where the end user is located.

10

11 **Q. AT PAGE 10, MR. MARTIN STATES THAT BELL SOUTH AND**  
12 **HYPERION DID NOT DISCUSS THE INTERPRETATION OF**  
13 **LOCAL TRAFFIC, NOR DID THEY STATE THAT CALLS TO ISPs**  
14 **SHOULD BE EXCLUDED. DO THESE FACTS INDICATE THAT**  
15 **BELL SOUTH INTENDED TO INCLUDE ISP CALLS IN THE**  
16 **INTERCONNECTION AGREEMENT WITH HYPERION?**

17

18 A. No, it does not. As the FCC stated in its *ISP Declaratory Ruling*, ISP calls are  
19 jurisdictionally mixed and appear to be largely interstate; hence, they should  
20 not be subject to reciprocal compensation.<sup>5</sup> The FCC added that incumbent  
21 LECs and competitive local exchange carriers (CLECs) are free, subject to  
22 negotiations, to include such ISP calls in interconnection agreements

23

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24 <sup>5</sup> *ISP Declaratory Ruling* at para. 22.

25

1 voluntarily.<sup>5</sup> But BellSouth clearly agreed to no wording that would indicate  
2 that it voluntarily chose to include ISP calls among those subject to reciprocal  
3 compensation. To the contrary, the clear definition of "local" calls included in  
4 the agreement as both originating *and* terminating in the same exchange or  
5 EAS exchange would expressly preclude such calls. That language plainly  
6 indicates that ISP-bound calls are beyond the scope of the agreement's  
7 reciprocal compensation provisions.

8  
9 Mr. Martin is attempting to confuse the issue. A long line of FCC rulings  
10 provides clear guidance that ISP calls are jurisdictionally interstate. And a  
11 clear understanding of how ISP services operate and provide value indicates  
12 that ISP calls are anything but "local." So not only are ISP calls interstate for  
13 jurisdictional purposes, they are interexchange calls in fact, as well. Given  
14 that, there is no reason to assume, in the absence of any stated willingness by  
15 BellSouth to include ISP calls in the agreement, that BellSouth somehow  
16 intended them to be subject to the reciprocal compensation provisions of  
17 Communications Act section 251.

18  
19 Moreover, BellSouth would have no reason to agree to include ISP calls  
20 among those subject to reciprocal compensation, and every reason not to. It  
21 would be utterly senseless for BellSouth to agree to an arrangement so clearly  
22 devastating to its own interests. As I stated in my direct testimony, an  
23 incumbent LEC is virtually guaranteed to be harmed in a situation in which it  
24 must serve as the "carrier of last resort" for end user customers that generate  
25 Internet traffic, while CLECs such as Hyperion are free to line up ISP



1 customers and simply wait to haul in reciprocal compensation payments. It is  
2 patently absurd to suggest that BellSouth would have voluntarily entered into  
3 any such arrangement that would result in subsidizing its competitors to the  
4 tune of millions of dollars.

5

6 **Q. AT PAGES 11-12, MR. MARTIN ASSERTS THAT HYPERION**  
7 **UNDERSTOOD THAT CALLS TO ISPS WERE LOCAL, BASED ON**  
8 **“THE FCC’S LONG-STANDING TREATMENT” OF SUCH CALLS AS**  
9 **LOCAL. HAS THE FCC EVER IDENTIFIED CALLS TO ISPS AS**  
10 **LOCAL CALLS?**

11

12 **A.** Absolutely not. Mr. Martin attempts to argue that the FCC had stamped ISP  
13 calls as local, citing the prevailing practice of provisioning them from  
14 BellSouth’s “local” tariff. He also cites the treatment of revenues in ARMIS  
15 reports. Similarly, the FCC has exempted calls to “enhanced service  
16 providers,” including ISPs, from interstate access charges. But those  
17 regulatory practices are possible only because ISP calls are interstate. As the  
18 FCC itself noted in its *ISP Declaratory Ruling*, “The fact that ESPs are exempt  
19 from access charges and purchase their PSTN [public switched telephone  
20 network] links through local tariffs does not transform the nature of traffic  
21 routed to ESPs. That the Commission exempted ESPs from access charges

22

23

24

25

1 indicates its understanding that ESPs in fact use interstate access service;  
2 otherwise, the exemption would not be necessary.”<sup>6</sup>

3  
4 The FCC goes on to say that it “discharged its interstate regulatory obligations  
5 through the application of local business tariffs.” In doing so, it acknowledges,  
6 ISP-bound traffic was to that extent treated “as though it were local.”<sup>7</sup> But the  
7 language here is crucial—and absolutely clear. The Commission never  
8 determined, in fact, that such traffic *was* local. And in fact it could not, since  
9 ISP-bound traffic does not terminate within the same local exchange where it  
10 originates. That is the conclusion the FCC itself drew in its *ISP Declaratory*  
11 *Ruling*. Regardless of the Commission’s decisions, for various policy reasons  
12 and discrete purposes, to treat ISP calls *as though they were* local, they clearly  
13 are not local, and the FCC has never stated that they are. Indeed, the  
14 Commission is now conducting a proceeding to determine a federal rule on  
15 reciprocal compensation for ISP calls, which it obviously would not have any  
16 ability to do if those calls were “local” and therefore in the intrastate  
17 jurisdiction.

18  
19 **Q. MR. MARTIN NOTES ON PAGE 12 OF HIS TESTIMONY THAT**  
20 **INTERNET DIAL-UP END USERS COMMONLY REACH THE**  
21 **INTERNET USING A SEVEN-DIGIT OR TEN-DIGIT “LOCAL”**

22  
23 

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<sup>6</sup> *ISP Declaratory Ruling* at para. 16.

24 <sup>7</sup> *ISP Declaratory Ruling* at para. 23.

1       **NUMBER. DOES THIS INDICATE THAT SUCH CALLS ARE IN**  
2       **FACT LOCAL?**

3  
4   A.   Again, this proves nothing about the nature of ISP calls. Simply because an  
5       end user dials a seven- or ten-digit number does not mean that call terminates  
6       within the same exchange. As I explained in my direct testimony, interstate  
7       foreign exchange (FX) services commonly make use of seven-digit or ten-digit  
8       “local” numbers, and they clearly provide interexchange service. This also is  
9       true of certain interstate, interexchange “dial-around” calls. FX and dial-  
10      around calls are not made subject to reciprocal compensation provisions simply  
11      because they are placed using a “local” number. So there is no logical reason  
12      that ISP calls—which are similarly interexchange in nature—should be subject  
13      to reciprocal compensation merely because they may be associated with seven-  
14      digit dialing.

15  
16   **Q.   AT PAGE 13, MR. MARTIN STATES THAT BELL SOUTH MADE NO**  
17       **ATTEMPT TO SEPARATELY METER ISP TRAFFIC. DOES THIS**  
18       **INDICATE THAT BELL SOUTH BELIEVED ISP CALLS WERE THE**  
19       **SAME AS INTRAEXCHANGE CALLS?**

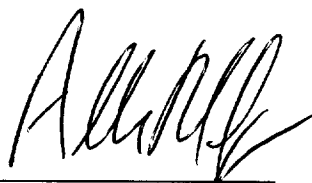
20   A.   Whether BellSouth made any attempt to separately meter outbound traffic  
21       carried to ISPs is completely irrelevant. No definitive way exists to determine  
22       whether traffic handed off to a CLEC is bound for an ISP, an interexchange  
23       carrier, or some other destination. Only through the use of elaborate and costly  
24       techniques “overlaid” onto the BellSouth network is it possible to reliably  
25

**AFFIDAVIT**

Washington, District of Columbia

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the aforesaid jurisdiction, personally came and appeared Albert Halprin, who being by me first duly sworn deposed and said that:

He is appearing as a witness before the Tennessee Regulatory Authority in Docket No. 98-00530 on behalf of BellSouth Telecommunications, Inc., and if present before the Authority and duly sworn, his testimony would be set forth in the annexed testimony consisting of 11 pages.



\_\_\_\_\_  
Albert Halprin

Sworn to and subscribed  
Before me this 12th  
Day of April, 1999

  
\_\_\_\_\_  
NOTARY PUBLIC

*Expire: 2/14/04*

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 1999, a copy of the foregoing document was served on the parties of record via facsimile, overnight, or US Mail, postage prepaid:

☒ Hand  
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BELLSOUTH TELECOMMUNICATIONS, INC.

99 APR 15 AM 8 22

REBUTTAL TESTIMONY OF JERRY HENDRIX

OFFICE OF THE  
EXECUTIVE SECRETARY

BEFORE THE TENNESSEE REGULATORY AUTHORITY

DOCKET NO. 98-00530

APRIL 15, 1999

**Q. PLEASE STATE YOUR NAME AND COMPANY NAME AND ADDRESS.**

**A.** My name is Jerry Hendrix. I am employed by BellSouth Telecommunications, Inc. ("BellSouth") as Director - Interconnection Services Pricing. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

**Q. ARE YOU THE SAME JERRY HENDRIX WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING?**

**A.** Yes.

**Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

**A.** The purpose of my testimony is to rebut testimony filed in this docket by Mr. David Martin, witness for AVR of Tennessee, L.P. d/b/a/ Hyperion of Tennessee, L.P. ("Hyperion")

1 Q. DO YOU AGREE WITH MR. MARTIN (p. 7) THAT THE PARTIES  
2 INTENDED THAT HYPERION BE ENTITLED TO ELECT THE  
3 RECIPROCAL COMPENSATION TERMS OF ANOTHER  
4 INTERCONNECTION AGREEMENT REGARDLESS OF WHETHER  
5 THE 3 MILLION MINUTE DIFFERENTIAL WAS MET?

6 A. No. Section IV.C of the Interconnection Agreement between BellSouth and  
7 Hyperion (“Agreement”) describes the parties’ intent concerning reciprocal  
8 compensation. It provides:

10 With the exception of the local traffic specifically identified in Section  
11 IV.H, for purposes of this Agreement, the parties agree that there will  
12 be no cash compensation for local interconnection minutes of use  
13 exchanged by the parties during the term of this Agreement unless the  
14 difference in minutes of use for terminating local traffic exceeds three  
15 million (3,000,000) minutes per state on a monthly basis. (emphases  
16 added)  
17

18 Unless the 3 million minute differential was met on a monthly basis, the parties  
19 agreed that no reciprocal compensation would be paid for local interconnection  
20 minutes of use exchanged by the parties. Mr. Martin’s claim that the parties  
21 intended that Hyperion could elect to receive reciprocal compensation  
22 regardless of whether this 3 million minute differential was ever met cannot be  
23 reconciled with the plain language of the Agreement.  
24  
25

1     **Q.     WHY DID BELL SOUTH AND HYPERION AGREE TO AN INTERIM**  
2     **‘BILL AND KEEP’ ARRANGEMENT?**

3  
4     A.     Mr. Martin correctly explains that Hyperion adopted BellSouth’s  
5     interconnection agreement with ICG. In so doing, Hyperion chose to use the  
6     specific language quoted above, which includes a threshold of terminating  
7     minutes of use, to avoid paying reciprocal compensation to BellSouth. The  
8     three million minute threshold evolved in the negotiations process as CLECs  
9     feared that the balance of terminating traffic would be unequal, and they would  
10    be required to pay BellSouth a large amount for reciprocal compensation. The  
11    three million minute threshold did not benefit BellSouth, and it was added only  
12    at the insistence of various CLECs.

13  
14  
15    **Q.     DO YOU AGREE WITH MR. MARTIN’S CLAIM THAT HYPERION**  
16    **IS ENTITLED TO ADOPT THE RECIPROCAL COMPENSATION**  
17    **TERMS OF ANOTHER AGREEMENT UNDER SECTION XIX OF**  
18    **HYPERION’S AGREEMENT?**

19  
20  
21    A.     No. Hyperion’s position that it can obtain reciprocal compensation under  
22    Section XIX is neither correct nor is it contractually sound. BellSouth did not  
23    and would never have agreed to a contract in which the language in one  
24    Section would render superfluous the language in another. Hyperion and  
25



1 BellSouth did not agree to the specific language into Section IV.C concerning  
2 the three million minute threshold to be rendered null and void by another  
3 Section of their own Agreement. Section XIX was never intended to  
4 circumvent the negotiation process as Hyperion seeks to do.

5  
6 I was the negotiator of the agreement with ICG, which Hyperion later chose to  
7 adopt. In negotiations with ICG, it was clear that Section IV.C would govern  
8 the issue of reciprocal compensation, not Section XIX. When Hyperion  
9 adopted this agreement, it adopted that provision as well. I can unequivocally  
10 state that it was not the intent of the parties to allow Section XIX to govern the  
11 reciprocal compensation arrangement. Rather, specific language was inserted  
12 into Section IV.C that gave Hyperion the right, once the 3 million minute  
13 threshold had been met, to either: (1) "elect the terms of any compensation  
14 arrangement for local interconnection then in effect between BellSouth and any  
15 other telecommunications carrier"; or (2) "in the absence of such an election,"  
16 to negotiate the specifics of a traffic exchange agreement with BellSouth. This  
17 language obviously must have some meaning, which is not the case under Mr.  
18 Martin's reading of the Agreement.  
19  
20

21  
22 **Q. DO YOU AGREE THAT THE CONDITIONS SPECIFIED IN EITHER**  
23 **SECTION IV.C OR SECTION XIX EXISTED AT THE TIME**  
24 **HYPERION SOUGHT TO AMEND THE AGREEMENT?**  
25

1  
2 A. No. Let me first state that it is irrelevant as to whether or not the conditions  
3 specified in Section XIX existed at the time Hyperion sought to amend the  
4 Agreement since Section XIX does not govern Hyperion's attempt to elect the  
5 terms of a reciprocal compensation arrangement in an existing BellSouth  
6 interconnection agreement. That having been clarified, I will now discuss the  
7 conditions specified in Section IV.C. Section IV.C clearly and  
8 unambiguously states that there must be a difference of three million minutes  
9 per month of terminating local minutes of use before Hyperion can elect the  
10 terms of another agreement. This condition simply has not been met in  
11 Tennessee.  
12

13  
14  
15 **Q. PLEASE COMMENT ON MR. MARTIN'S CLAIM, ON THE BOTTOM**  
16 **OF PAGE 8, THAT THE LOCAL MINUTES TERMINATED BY**  
17 **BELLSOUTH FROM HYPERION EXCEEDED THREE MILLION**  
18 **MINUTES IN APRIL AND MAY 1998.**  
19

20 A. Mr. Martin is mistaken. The figures provided by Mr. Martin, which he claims  
21 are according to "BellSouth's own measurement," reflect total minutes of use,  
22 not the "minutes of use of terminating local traffic." If "minutes of use of  
23 terminating local traffic" are considered, it is obvious that the 3 million minute  
24 threshold set forth in Section IV.C has not been met, as set forth in greater  
25 detail in Exhibit JH-1.

1

2 **Q. DO YOU AGREE WITH MR. MARTIN (p. 10) THAT CALLS TO ISPS**  
3 **SHOULD BE CONSIDERED IN CALCULATING WHETHER THE**  
4 **DIFFERENCE IN MINUTES OF USE OF TERMINATING LOCAL**  
5 **TRAFFIC EXCEEDS 3 MILLION MINUTES OF USE ON A**  
6 **MONTHLY BASIS?**

7

8 A. No. The only usage to consider in determining whether the 3 million minute  
9 threshold has been met is “minutes of use of terminating local traffic.” The  
10 Agreement defines “local traffic” as “any telephone call that originates in one  
11 exchange and terminates in either the same exchange, or an associated  
12 Extended Area Service (‘EAS’) exchange.” As explained in my direct  
13 testimony and in the testimony of Albert Halprin and as confirmed by the FCC,  
14 calls to an ISP do not “terminate” at the ISP’s local server. Thus, calls to an  
15 ISP do not fit within the definition of “local traffic” that should be considered  
16 in calculating the 3 million minute threshold.

17

18 **Q. PLEASE COMMENT ON MR. MARTIN’S ANSWER TO THE**  
19 **QUESTION ON PAGE 10 OF HIS DIRECT TESTIMONY, “... DID**  
20 **HYPERION HAVE AN UNDERSTANDING AS TO WHETHER CALLS**  
21 **TO ISPS FIT WITHIN THE DEFINITION OF LOCAL TRAFFIC?”**

22

23 A. Mr. Martin states that Hyperion understood calls to ISPs to be local, and  
24 therefore within the definition of Local Traffic in the Agreement, “based on  
25 what [it] understood to be the FCC’s long-standing treatment of calls to ISPs as

1 local.” However, Mr. Martin never expressed this alleged understanding to me  
2 during negotiations. Furthermore, I do not share Mr. Martin’s purported  
3 “understanding” of the FCC’s historical treatment of calls to ISPs. As the FCC  
4 recently confirmed in Paragraph 12 of its *Declaratory Ruling in CC Docket*  
5 *No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*,  
6 (“FCC ISP Ruling”), the FCC has long held that the jurisdiction of traffic is  
7 determined by the end-to-end nature of a call. It is, therefore, irrelevant that  
8 the originating end user and the ISP’s POP are in the same local calling area or  
9 that local interconnection trunks are used to transmit calls to ISPs, because the  
10 ISP’s POP is not the terminating point of this ISP traffic.  
11

12 The FCC has always recognized that the true nature of ISP traffic is access  
13 traffic. For example, in the 1983 order in which it initially established the ISP  
14 access charge exemption, the FCC stated: “Among the variety of users of  
15 access service are ... enhanced service providers.” Likewise, in its 1987 Notice  
16 of Proposed Rulemaking in CC Docket No. 87-215 in which it proposed to lift  
17 the ISP access charge exemption, the FCC stated:  
18

19 We are concerned that the charges currently paid by enhanced service  
20 providers do not contribute sufficiently to the costs of the exchange  
21 access facilities they use in offering their services to the public. As we  
22 have frequently emphasized in our various access charge orders, our  
23 ultimate objective is to establish a set of rules that provide for recovery  
24 of the costs of exchange access used in interstate service in a fair,  
25 reasonable, and efficient manner from all users of access service,

1           regardless of their designation as carriers, enhanced service providers, or  
2           private customers. Enhanced service providers, like facilities-based  
3           interexchange carriers and resellers, use the local network to provide  
4           interstate services. To the extent that they are exempt from access  
5           charges, the other users of exchange access pay a disproportionate share  
6           of the costs of the local exchange that access charges are designed to  
7           cover. (emphases added)

8  
9           In both of these dockets, the FCC decided not to impose access charges on  
10          ESPs, of which ISPs are a subset. In each case, however, the FCC – after  
11          referring to the interstate nature of the call – cited only policy reasons for its  
12          decision, in particular, its concern that imposing access charges at that time  
13          upon ESPs could jeopardize the viability of what was still a fledgling industry.

14  
15          Notably absent from any of these decisions is a determination by the FCC, or  
16          even a question raised by it, that traffic to ISPs is local traffic, rather than  
17          access traffic. Instead, in each case, the FCC granted or perpetuated an  
18          exemption from the access charge regime, based solely on pragmatic (and  
19          political) considerations regarding the impact of existing access charges on the  
20          ESP / ISP industry. Moreover, in each instance, the FCC specifically noted the  
21          possibility that access charges, either as currently structured or modified, might  
22          be applied at some point in the future to ISPs. If the FCC had concluded that  
23          traffic received by ISPs was local, there would have been no need for it to  
24          exempt that traffic from the access charge regime; access charges would not  
25          have been applied in the first place.

1       Moreover, the FCC could not have held out the possibility that it might, in the  
2       future, assess some sort of access charge on such traffic. It should be noted  
3       that this exchange access arrangement parallels the Feature Group A (FGA)  
4       arrangement, where access charges are applicable. On Feature Group A calls,  
5       as with ISP calls, end users dial local numbers to make interstate interLATA  
6       calls, and thus switched access charges apply to the FGA subscriber.

7  
8       Therefore, under clear FCC precedent, calls bound for the internet through an  
9       ISP's bank of modems can only be characterized as interstate exchange access  
10      traffic because they do not "terminate" at the ISP's POP, but rather the call  
11      continues to the database or information source to which the ISP provides  
12      access. The FCC, for policy reasons, has exempted ISPs for almost sixteen  
13      years from paying switched access charges to the local exchange companies for  
14      originating computer-based non-voice enhanced service traffic to them. This  
15      in no way alters the fact that the traffic they collect is interstate access traffic,  
16      not local traffic. It is important to note that BellSouth's compliance with the  
17      FCC access charge exemption (by not applying access charges for the  
18      origination of computer-based non-voice enhanced service traffic to ISPs) in  
19      no way implies that BellSouth must pay reciprocal compensation on such  
20      traffic.

21

22   **Q.   DO YOU AGREE WITH MR. MARTIN'S ASSERTION (p. 11) THAT**  
23   **THE DEFINITION OF LOCAL TRAFFIC DOES NOT RELY ON THE**  
24   **"JURISDICTIONAL" NATURE OF ISP TRAFFIC?**

25

1 A. No. Although Mr. Martin correctly states that “local traffic is specifically  
2 defined for purposes of this Agreement,” he makes no attempt to fit ISP traffic  
3 into that definition consistent with the FCC’s jurisdictional treatment of such  
4 traffic. The FCC recently confirmed that ISP traffic does not terminate at the  
5 ISP’s local server; thus calls to an ISP do not terminate in the same exchange  
6 or associated EAS so as to constitute “local traffic” under the agreement.  
7 Because the FCC’s jurisdictional treatment of ISP traffic is fatal to Hyperion’s  
8 case, Mr. Martin wants the Authority to simply overlook it. However, the  
9 parties’ reciprocal compensation obligations are “as described in the Act,”  
10 which the parties agreed means “as described in or required by the Act and as  
11 from time to time interpreted in the duly authorized and effective rules and  
12 regulations of the FCC or the Commission.” (Definitions I.F & I.HHH). Thus,  
13 the FCC’s jurisdictional treatment of ISP traffic cannot be so readily  
14 disregarded in interpreting the Agreement, as Mr. Martin attempts to do.

15

16 **Q. PLEASE ADDRESS THE FACTORS THAT MR. MARTIN REFERS TO**  
17 **AS INDICATIONS THAT THE FCC AND THE PARTIES INVOLVED**  
18 **TREATED CALLS TO ISPS AS LOCAL (p. 12).**

19

20 A. First, none of these factors has anything to do with the parties’ intent to only  
21 treat traffic that originates and terminates in the same exchange or EAS as  
22 “local traffic.” Second, all of the factors mentioned by Mr. Martin fall outside  
23 the control of BellSouth and are simply a direct consequence of the FCC’s  
24 decision to exempt ISPs from paying access charges.

25

1 **Q. DOES BELLSOUTH HAVE THE CAPABILITY TO SEPARATE ISP**  
2 **TRAFFIC FROM OTHER TRAFFIC AND DOES BELLSOUTH**  
3 **SEPARATELY INCLUDE CALLS TO ISPS IN LOCAL TELEPHONE**  
4 **CHARGES?**

5  
6 A. BellSouth does have the capability to separate ISP traffic from other traffic if  
7 the telephone number of the ISP is known. BellSouth currently has a process  
8 in place by which it collects ISP telephone numbers. BellSouth does not have  
9 a need to separately include calls made to ISPs in local telephone charges since  
10 BellSouth offers predominately flat-rated local exchange service. This type  
11 offering eliminates the need for call-specific information on local telephone  
12 charges.

13  
14 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

15  
16 A. Yes.



BellSouth Telecommunications, Inc.  
 TRA Docket No. 98-00530  
 Exhibit JH-1  
 April 15, 1999

**TENNESSEE**

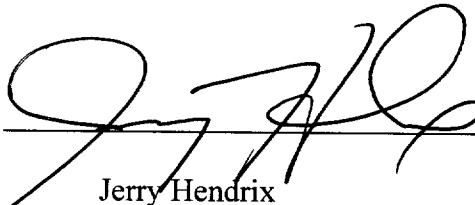
	Hyperion ISP Minutes of Use	Total Local Minutes of Use Terminating to Hyperion – TN	Total Local Minutes of Use Terminating to BellSouth	Difference in Terminating Local Minutes of Use
Jan-98	216,945	24,105	0	24,105
Feb-98	1,222,260	135,807	243,587	(107,780)
Mar-98	2,454,420	272,713	224,949	47,764
Apr-98	3,058,846	339,872	361,719	(21,847)
May-98	3,743,963	415,996	443,234	(27,238)
Jun-98	4,709,914	523,324	646,748	(123,424)
Jul-98	5,322,917	591,435	739,032	(147,597)
Aug-98	9,023,109	1,002,568	903,671	98,897
Sep-98	12,332,296	1,370,255	904,432	465,823
Oct-98	15,315,108	1,701,679	891,859	809,820
Nov-98	15,841,064	1,760,118	1,152,298	607,820
Dec-98	19,758,902	2,195,433	1,011,057	1,184,376
Jan-99	29,472,532	3,274,726	1,102,642	2,172,084
Feb-99	28,460,034	3,162,226	1,343,923	1,818,303

AFFIDAVIT

STATE OF: Georgia  
COUNTY OF: Fulton

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the State and County aforesaid, personally came and appeared Jerry Hendrix, Senior Director-Revenue Management, N&CS Marketing, BellSouth Telecommunications, Inc., who, being by me first duly sworn deposed and said that:

He is appearing as a witness before the Tennessee Regulatory Authority in Docket No. 98-00530 on behalf of BellSouth Telecommunications, Inc., and if present before the Authority and duly sworn, his testimony would be set forth in the annexed testimony consisting of 11 pages and 1 exhibit(s).

  
Jerry Hendrix

Sworn to and subscribed  
before me this 13<sup>th</sup>  
day of April, 1999

  
NOTARY PUBLIC

**MICHEALE F. HOLCOMB**  
Notary Public, Douglas County, Georgia  
My Commission Expires November 3, 2001

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 1999, a copy of the foregoing document was served on the parties of record via facsimile, overnight, or US Mail, postage prepaid:

☒ Hand  
☐ Mail  
☐ Facsimile  
☐ Overnight Mail

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